# INDEX



## CITATIONS

Statutes—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 30

LELORD KORDEL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 461–467) is reported at 164 F. 2d 913. The opinion of the district court (R. 440–443) is reported at 66 F. Supp. 538.

### JURISDICTION

The judgment of the Court of Appeals was entered November 6, 1947 (R. 468), and a petition for rehearing was denied January 22, 1948 (R. 474). On February 16, 1948, Mr. Justice Murphy extended the time for filing a petition for a writ of certiorari to and including March 15, 1948 (R. 480). The petition for a writ of certiorari was filed March 5, 1948, and was granted April 19, 1948 (R. 480). The jurisdiction of this Court is conferred by Section 240 (a)

of the Judicial Code as amended by the Act of February 13, 1925, now 28 U. S. C. 1254. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

## QUESTIONS PRESENTED

1. Whether petitioner's shipments of certain drugs in interstate commerce were "accompanied" by false and misleading literature and hence were "misbranded" in violation of Section 301 (a) of the Federal Food, Drug, and Cosmetic Act.

2. Whether petitioner should have been prosecuted by indictment rather than by information.

## STATUTE INVOLVED

The pertinent provisions of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 (21 U. S. C. 301 *et seq.*) are set forth in the Appendix, pp. 25–26.

## STATEMENT

Three informations containing a total of 20 counts charging violations of Section 301 (a) of the Federal Food, Drug, and Cosmetic Act were filed against petitioner in the District Court for the Northern District of Illinois (R. 3–9, 19–37, 49–106).[1] Each count alleged a violation of Section 301 (a) in that on a specified date petitioner

[1] Petitioner's wife, Laura Kordel, who was also charged as a co-defendant in one of the informations (45 CR 488), was acquitted (R. 444).

shipped in interstate commerce an article of drug to a named consignee; that certain literature shipped on a specified date (see *infra*, p. 5) and in a described manner to the same consignee accompanied the drug; and that the drug was misbranded within the meaning of the Act because the statements in the accompanying literature were false and misleading.

The informations were consolidated for trial (R. 119) before the court, a jury having been waived (R. 124). The parties stipulated certain of the facts, included among which was the fact that with respect to each of the twenty counts the petitioner shipped, or caused to be shipped, the drug and printed matter in interstate commerce to the consignee. (R. 432–439.) In 7 of the 20 counts the drugs and certain booklets were shipped in the same cartons to their interstate consignees. These were Counts I–IV of Information 45 CR 490 involving the booklets entitled "What You Can Do About Relieving the Agonies of Arthritis" (R. 19–32), and Counts II, VI and X of Information 46 CR 1 involving the booklets entitled "Nutrition Guide" (R. 55–61; 78–80, 90–97). In the remaining 13 counts, the leaflets, booklets or circulars involved were shipped separately, and at different times, from the drugs with which they were associated.

The following table shows the dates of shipments, and the time intervals with respect to the various counts (R. 432–438):

| Information | Count | Drug | Date Shipped | Literature | Date Shipped | Consignee | Time Interval in Days |
|---|---|---|---|---|---|---|---|
| 45 CR 488 | 1 | Gotu Kola | Nov. 6, 1943 | "Does this Exotic Plant from Ceylon hold the Answer to Man's Search for the Secret of 'Rejuvenation'?" | May 6, 1943 | Park-Phillips Health Foods Co., Cincinnati, Ohio. | 184 days before drug |
| 45 CR 490 | 1 | Minerals | Jan. 18, 1944 | "What You Can Do About Relieving the Agonies of Arthritis." | Jan. 18, 1944 | Dr. McCormick's Natural Foods Co., Seattle, Wash. | 0 |
| | 2 | Sarsaparilla Root | Jan. 18, 1944 | do | Jan. 18, 1944 | do | 0 |
| | 3 | Cetabs | Jan. 18, 1944 | do | Jan. 18, 1944 | do | 0 |
| | 4 | Feinugreek Tea | Jan. 18, 1944 | do | Jan. 18, 1944 | do | 0 |
| | 5 | Fero-B-Plex | Jan. 20, 1944 | do | Jan. 18, 1944 | do | 2 days before drug |
| | 6 | Bolax | July 10, 1942 | do | Jan. 18, 1944 | do | 561 days after drug |
| 46 CR 1 | 1 | Cetabs | Jan. 22, 1945 | "Health Today Spring 1945" | Feb. 27, 1945 | Western Natural Foods Co., Seattle, Wash. | 36 days after drug |
| | 2 | Ormotabs | Jan. 22, 1945 | "Nutrition Guide" | Jan. 22, 1945 | do | 0 |
| | | | | "Health Today Spring 1945" | Feb. 27, 1945 | do | 36 days after drug |
| | 3 | Ribotabs | Jan. 22, 1945 | do | Feb. 27, 1945 | do | 36 days after drug |
| | 4 | Fero-B-Plex | Jan. 22, 1945 | "What You Can Do About Relieving the Agonies of Arthritis." | Nov. 13, 1944 | do | 71 days before drug |
| | | | | "Health Today Spring 1945" | Feb. 27, 1945 | do | 36 days after drug |
| | 5 | Minerals | Jan. 22, 1945 | do | Nov. 13, 1944 | do | 71 days before drug |
| | | | | "Health Today Spring 1945" | Feb. 27, 1945 | do | 36 days after drug |
| | 6 | Bolax | Jan. 22, 1945 | "Nutrition Guide" | Jan. 22, 1945 | do | 0 |
| | | | | "What You Can Do About Relieving the Agonies of Arthritis." | Feb. 27, 1945 | do | 36 days after drug |
| | 7 | Kordel Tablets | Jan. 22, 1945 | "Health Today Spring 1945" | Feb. 27, 1945 | do | 36 days after drug |
| | 8 | Everm | Jan. 22, 1945 | do | Feb. 27, 1945 | do | 36 days after drug |
| | 9 | Kordel A | Jan. 22, 1945 | do | Feb. 27, 1945 | do | 36 days after drug |

| | | | | | | |
|---|---|---|---|---|---|---|
| 10 | Fenugreek Tea | Jan. 22, 1945 | "Nutrition Guide" | Jan. 22, 1945 | do | 0 to 105 days before drug |
| | | | "Twenty Short Lessons in the Art of Relaxation" and "Stomach Agony." | Oct. 9, 1944 to Nov. 25, 1944. | do | |
| | | | "What You Can Do About Relieving the Agonies of Arthritis." | Nov. 13, 1944 | do | 71 days before drug |
| | | | "Health Today Spring 1945" | Feb. 27, 1945 | do | 36 days after drug |
| 11 | Garlic Plus | Jan. 22, 1945 | do | Feb. 27, 1945 | do | 36 days after drug |
| 12 | Niamin | Jan. 22, 1945 | do | Feb. 27, 1945 | do | 36 days after drug |
| 13 | Sarsaparilla Tea | Oct. 16, 1944 | "What You Can Do About Relieving the Agonies of Arthritis." | Sept. 5, 1944 | Rosenberg's Original Health Food Store, San Francisco, Calif. | 41 days before drug |

Petitioner was convicted on each of the twenty counts and was sentenced to pay a fine of $200 on each count (R. 444–446). Upon appeal to the Court of Appeals for the Seventh Circuit, the judgments were affirmed (R. 468).

The essential facts regarding the various counts are summarized briefly as follows:

Petitioner writes and lectures on health foods on the basis of information obtained from reading books in his private library and in libraries throughout the United States (R. 416–417). Since January, 1941, he has been marketing his own health food products (R. 417).

*Information 45 CR 488, 1 Count.* In November, 1943, he shipped from Chicago, Illinois, a quantity of a drug called "Gotu Kola" to the Park-Phillips Health Food Company, in Cincinnati, Ohio, and the shipment was received by the consignee. Six months earlier, in May, 1943, he caused to be shipped to the same consignee thousands (R. 162) of circulars entitled, "Does this Exotic Plant from Ceylon hold the Answer to Man's Search for the Secret of 'Rejuvenation'?" (R. 432.)[2] The labels affixed to the containers of the drug bore no statements as to the purposes for which the drug was intended to be used, declaring only that it was intended as a dietary supplement for experimental use and that the need in human nutrition of the principal ingredient had not been

[2] The pertinent portions of the text of the circular are set forth in the information (R. 4–7).

established (R. 4). The circulars, however, represented and suggested uses for the drug claiming, among other things, that it was a "rich, natural, seemingly secret, source of dynamic energy." (R. 4–7, Ex. 24.) The circulars bore the mailing permit of the consignee, the permit having been printed thereon when the circulars were prepared, and some appear to have been mailed to prospective customers (R. 161, 167). Others were placed in open view in various parts of the consignee's health food store near petitioner's product and were available to anyone who came into the store (R. 166–167).

Dr. Anton J. Carlson, the distinguished physiologist and biologist, testified in detail concerning the statements in the circular, and stated that they were totally false (R. 380–397). He characterized various statements as "fantastic" and "untrue" (R. 390); as "reprehensible and artistic lying" (R. 392); as "perfect stupidity" and "misleading" (R. 393); as "false" (R. 394); and "interesting fiction" (R. 395); and as "really dangerous to the public and individual health" (R. 396).

*Information 45 CR 490, 6 Counts.* This shipment involved the shipment of various drugs by petitioner in Chicago, Illinois, to Dr. McCormick's Natural Foods Co., Seattle, Washington (R. 443–444). The booklet involved, entitled "What You Can Do About Relieving the Agonies of Arthritis", which is alleged to have been a part of the labeling of each of the drugs, was marked with a purchase

price and could be purchased independently of the drugs. (R. 133.) Each of the drugs involved, "Minerals plus Chlorophyll and Vitamin D" (Count I, R. 20), "Sarsaparilla Root" (Count II, R. 28), "Cetabs" (Count III, R. 30), "Fenugreek Tea" (Count IV, R. 32), "Fero-B-Plex" (Count V, R. 33–34), and "Bolax" (Count VI, R. 35–36), bore labels which set forth the recommended dosage or amounts to be used, but contained no statements as to the purposes for which the drugs were intended to be used. The health food dealer testified that a purchaser "would have to go to reliable sources" for information as to the uses of the articles (R. 134) if he did not have the booklet to describe those uses. The booklet (Govt. Ex. 1), however, which was prepared by the petitioner, who described himself as a writer and lecturer on nutritional subjects but who possessed no qualifications as a scientist (R. 416–421), represented that the articles alone and in combination would be efficacious in the cure, mitigation, treatment and prevention of arthritis. These booklets (Govt. Ex. 1) were displayed to prospective purchasers in a wire rack in the health food store within 6 to 10 feet of the shelf on which the drugs were displayed. (R. 131, 139.)

A physician specializing in the treatment of arthritis (R. 296–299) testified that the theory expounded in the booklet "What Can You Do About Relieving the Agonies of Arthritis" had been "originated probably long ago," and has

been "thrown in the ash can probably" (R. 307). He testified also that there was no specific cure for arthritis (R. 311); that the recommendations in the booklet were "absurd" (R. 316, 317); that the recommended diet was "terribly unbalanced" (R. 319); and that the products which were recommended to be used in the treatment of arthritis, singly or in combination, would be of "no value" and would have no effect whatsoever in the treatment of this disease (R. 320, 322).

*Information 46 CR 1, 13 Counts.* The first 12 counts arose from the interstate shipment of 12 articles of drug on or about January 22, 1945, by the petitioner in Chicago, Illinois, to the Western Natural Foods Company, Seattle, Washington (R. 49–105), and Count 13 arose from the interstate shipment by the petitioner in Chicago of an article of drug on October 16, 1944, to Rosenberg's Original Health Food Store, San Francisco, California (R. 105).

The drugs—which included among others the preparations involved in 45 CR 490—have the same type of labels, and the uses for which they were intended were explained only in the collateral literature. (R. 49–50, 56, 61, 64–65, 73, 78–79, 81, 84, 88, 91, 97–98, 101, and 105–106, Govt. Ex. 8, 8A, 8B, 8C, 10 and 11.)

The drugs were displayed in the Western Natural Foods Company store on a shelf within the sight of customers. (R. 146.) "Health Today Spring 1945" (Govt. Ex. 8) was used largely as a

"mailing piece" and had the consignee's mailing permit printed thereon, but some copies were left on counters in the store to be picked up by or handed to customers (R. 144, 334–335), and some were wrapped with merchandise. (R. 143, 334.) The other booklets (Govt. Ex. 8A, 8B, 8C) were obtained from the store where they were offered to the public for sale. (R. 146, 151, 155.) The placard entitled "Stomach Agony" was displayed in the show window. (Govt. Ex. 9, 11, R. 143. 151.)

With regard to Count 13, the article of drug was displayed on a shelf about 25 feet from a book case or glass shelf containing the booklet "What You Can Do About Relieving The Agonies of Arthritis". (R. 287, Govt. Ex. 27.) Some of the booklets were sold and could be purchased independently of the drug (R. 290), but others were given away for promotional reasons. (R. 287.) Both the drug and the booklet were in sight of customers (R. 287, 294), and many people would look over the literature and then purchase the Kordel products. (R. 287–289.) The booklets arrived earlier and the store had a surplus stock of them. (R. 287, 294.)

Expert medical witnesses characterized statements in the booklet "Health Today" as "heinous" (R. 176), "very false" (R. 176, 231), "dangerously misleading" (R. 225), "ridiculous" (R. 235, 370), and "absurd" (R. 347). They said that the drugs would be of no benefit and would

not be effective in the treatment of the diseases for which they were recommended (R. 179, 181, 183, 185, 190, 197, 222, 237). They testified that if the recommendations in the booklet were followed and the drugs taken as indicated, it might be "harmful" and "very dangerous" (R. 176, 191, 212, 257). Statements in the booklet "Nutrition Guide" were said to be "not true" (R. 366); and it was testified that the products therein recommended would not be effective and could not possibly aid in the conditions mentioned (R. 193, 343, 373). With reference to recommendations in the booklet "Twenty Short Lessions in the Art of Relaxation", one medical expert said that it encourages persons to experiment on themselves "and that means that they are gambling with their health and their life" (R. 373).

The defense offered no testimony, on any of the counts, to controvert the expert evidence adduced by the Government to show that the representations made for the drugs, as set out in the information, were false and misleading. The trial court found, as to each count, that the booklets were shipped by Kordel; that drugs and booklets were sent to the same consignee; that the booklets were displayed and were intended to be distributed in relation to the drug; and that the booklets, pamphlets, or circulars were false and misleading (R. 443).

## SUMMARY OF ARGUMENT

The principal question in this case is also involved in the companion case, *United States* v.

*Urbeteit*, No. 13. The Government has argued in that case that the Federal Food, Drug, and Cosmetic Act was carefully devised to protect the ultimate consumer from misbranded drugs, and that its protective provisions can not be evaded by separate shipment of a drug and the printed matter prepared to explain its intended uses. Booklets which accompany the sales of drugs to which they relate, which are displayed and are intended to be distributed in conjunction with the drugs, and which explain the uses to be made of such drugs, are "labeling" within the meaning of the Act. The petitioner may not insulate himself from liability for shipping misbranded drugs by placing a nominal price tag on the printed matter and considering the "sale" of the labeling as unrelated to the sale of the drug.

The maximum penalty that could have been imposed for any of the crimes charged was imprisonment for not more than one year, or a fine of not more than $1,000, or both. The crimes were not infamous and petitioner was properly prosecuted by criminal information. Sec. 303 (b), 21 U. S. C. 333 (b), on which petitioner relies, does establish a grade of crime which is infamous, but petitioner was not charged with that grade of the offense.

## ARGUMENT

### I

### PETITIONER SHIPPED DRUGS IN INTERSTATE COMMERCE WHICH WERE MISBRANDED BECAUSE "ACCOMPANIED" BY FALSE AND MISLEADING LITERATURE

A. As to thirteen counts (see p. 3. *supra*), the drugs and literature were not shipped simultaneously in interstate commerce, and petitioner contends that the drugs were therefore not misbranded when introduced into interstate commerce (Sec. 301 (a)). This raises substantially the same questions as are involved in No. 13, *United States* v. *Urbeteit*, and the Court is respectfully referred to the arguments made in the brief filed by the Government in that case.

It may be noted that this case involves a criminal prosecution rather than a condemnation proceeding. It is submitted, however, that the issue of construction is essentially similar, and that the considerations of history and policy set forth in the *Urbeteit* brief are equally persuasive here. Petitioner argues that a stricter rule of construction should apply because this is a criminal statute. But, as was said by Mr. Justice Holmes for the Court in *Roschen* v. *Ward*, 279 U. S. 337, 339:

> We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean.

And see *United States* v. *Dotterweich*, 320 U. S. 277, 280.

The petitioner urges that the term "labeling" is confined to printed matter incidental to, dependent upon, and physically connected to a drug (Br. 15). He claims support for his contention in the underlying theory of the regulatory law, the source of the statutory terminology, the phraseology of the definition, and the legislative history of Section 201 (m) (Br. 15–16).

There can be no doubt as to the underlying theory of the Federal Food, Drug, and Cosmetic Act. It was carefully devised to protect the ultimate consumer from misbranded and adulterated drugs from the time they enter the channels of commerce until they are purchased for consumption. *United States* v. *Sullivan*, 332 U. S. 689, 696–697. Nothing in the purposes of the Act or the theory underlying it indicates that its beneficial protective provisions may be evaded by the expedient of separate shipment of a drug and the printed matter prepared to explain its intended uses.

The statute defines "labeling" to include "written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompany such article." The argument is advanced by petitioner that "accompanying such article" closely approximates language used by this Court in *Seven Cases of Eckman's Alterative* v. *United States*, 239 U. S. 510, 517; and, thus, that

it should be construed to mean "accompanying such article in the package". (Br. 17–18.) We submit that there is no sound basis for the insertion of the restrictive phrase "in the package" into the definition by a process of construction. The plain wording of the definition excludes the notion that the content of the package is the full test of accompaniment. The first clause covers all matters comprising the cartons in which drugs are transported and sold. The additional clause "accompanying such article" was used by the Congress to extend the definition to reach printed or graphic matter associated with an article of drug but which appeared neither upon nor within its package.

The Government's brief in the companion case, *United States* v. *Urbeteit*, No. 13, pp. 15–21, demonstrates that petitioner can find no support for his contention in the historical and legislative background of the Act.

The factors that are vital to show that the printed matter "accompanied" the drugs are present in this case. The drugs and the leaflets had a common origin,[3] a common destination, and were displayed together in the several health food stores. The criminal informations set forth ver-

[3] Petitioner states that the drugs and literature originated from two different cities in Illinois. (Br. 2.) This is untrue except as to Information 45CR488. In that case, the drug was shipped from Chicago and the literature was shipped on petitoner's order from Mendota, Illinois, which is appproximately 65 miles from Chicago.

batim the labels of the drugs. The labels alone do not inform purchasers of the purposes and intended uses of the drugs. The accompanying booklets advised purchasers of the uses of the drugs, and the sale of the drugs is necessarily dependent upon the printed matter. Without the leaflets and booklets, the drugs lack labeling, because nowhere else is the purchaser informed of the uses of the drug. Drug and literature were designed to be used together in furtherance of the commercial distribution of the drug. The courts below were clearly warranted in concluding that the booklets were prepared, shipped, and distributed to dealers with the expectation and intent that they would serve the purposes of labeling.

Insistence upon a showing that the drugs and printed matter were introduced into commerce together would lead to a very strange result in this case. In Counts I-IV of 45 CR 490 the booklets, "What you Can do About Relieving the Agonies of Arthritis" were shipped in the same cartons with the drugs. But in Counts V and VI they were shipped separately. However, the drugs and literature involved in all counts were together when presented to consumers by the consignee. (R. 131, 139.) This emphasizes the impracticability of applying the physical association test in undertaking to control a course of business of the type conducted by Kordel. If the physical association test were adopted, the same booklet would be "labeling" for purposes of four counts but not

for the other two, even though the deceptive effect on the consumer is identical.

The petitioner urges that the leaflet "Health Today Spring 1945" and the "Gotu Kola" circular were intended as "mailing pieces," and because of their advertising nature are excluded from the definition of labeling. The Government's brief in the companion case, *United States* v. *Urbeteit*, No. 13, meets this contention (pp. 32–37).

The record shows that, while the two circulars bore the mailing permit numbers assigned to the consignees and were mailed out by them in large numbers, it was also a general practice to hand them out to customers over-the-counter and to wrap them with merchandise. (R. 143–145, 148, 151, 155, 166, 334–335.) By placing the mailing permit numbers on the printed matter, the petitioner did nothing more than facilitate a wider distribution of the printed matter. It was not, as petitioner suggests, a "mere accident" that the leaflets and circulars were present on the same premises. On the contrary, they were there by design of petitioner, and they were intended to be used to advance the sale of his drugs by explaining their intended uses. They served as labeling to lead purchasers to belief that the drugs would accomplish the benefits that were falsely stated and implied for them. We submit that the mailing permit on the circulars and the fact that many were mailed to prospective purchasers does

not exclude them from the statutory definition of labeling.

The petitioner, who was the author of the literature, suggests that prosecution should be brought against the dealer under Section 301 (k), 21 U. S. C. 331 (k) (Br. 34.) That would allow the escape of the real culprit, the person responsible for the misbranding. The factor of interdependence of drug and literature in the concept of accompaniment gives assurance that the persons who actually misbranded the articles will be held. There is no hardship involved, for surely the person who knows what he makes and vends should be held accountable for his misrepresentations.

B. Petitioner also urges that he should be excused from the penalties of the Act arising from Counts I–V of 45 CR 490 (R. 19–32) and Counts II, VI, and X of 46 CR 1 (R. 55–61, 78–80, 90–97) in which the printed matter was physically associated in the shipping cartons with the drugs during the interstate journey. His reason is that the printed matter was plainly marked with a selling price, and thus cannot constitute "labeling". The evidence shows without dispute that the booklets were prominently displayed on racks in close proximity to the drugs. The labels affixed to the drugs contained no information as to the intended uses of the preparations, but the booklets did contain such information in elaborate detail. It is certainly a

legitimate inference (which the trier of the facts was warranted in drawing) that the booklets were intended to be and were thus displayed in conjunction with the drugs, for the purpose of informing prospective purchasers of the uses to which the drugs might be put. Thus, the booklets served the purpose of labeling equally as much as if they had been physically attached to the retail packages. See *United States* v. *Lee*, 131 F. (2d) 464, 466 (C. C. A. 7).

Petitioner contends that the booklets were in the nature of scientific publications which had value apart from the drugs. But the district court was warranted by the evidence in rejecting this contention. Lelord Kordel, though he describes himself as a writer and lecturer on nutritional subjects,[4] possesses no qualifications which class him as a scientist. (R. 416–421.) He is a distributor of drug preparations which he represents to the public by means of these pseudo-scientific pamphlets. "Couched in such [form] undoubtedly the printed matter makes a more persuasive appeal to the credulity of sufferers * * * and for that reason they are not less, but more, obnoxious to the law." *United States* v. *John J. Fulton Co.*, 33 F. (2d) 506, 507 (C. C. A. 9).

Petitioner's booklets are devoted entirely to promoting the sale of his products. For example, the

[4] Govt. Ex. 8, p. 1, contains an editorial in which the petitioner describes himself as "America's Famous Nutrition and Vitamin Authority".

booklet on Arthritis sets out a regime to be used by an arthritic from the first twinge in the joints until the disease is far advanced—a regime which would sell almost the entire Kordel line of preparations. The district court found that the factual information is grossly false, and is in no sense scientific. The booklet "Nutrition Guide" is of the same type. It is concerned primarily with promoting by explaining the need for and the claimed usefulness of the Kordel drugs. In each of the supposedly scientific publications there appears a price list of the drugs which are promoted and explained in the text of the publication.

There would be another large loophole in the law through which the unscrupulous might pass if, by the simple device of marking the labeling with a nominal price and considering the "sale" of the booklet as unrelated to the sale of the drugs, the booklet was thereby excluded from the definition of labeling. We submit, however, that the booklets and the drugs are interdependent and together form an interlocking scheme to sell the public on the merits of petitioner's products.

The Court of Appeals rejected petitioner's contention in these words (R. 463, 465):

> * * * the placing of * * * the price tag on the literature cannot insulate appellant from liability for introducing the drugs and their related descriptive matter into interstate commerce together by consignment to the same consignee for dis-

tribution by him. The evidence is clear that the booklets were actually displayed on racks close to the counter where the products were sold and that they were necessary to inform the purchasing public of the uses to which these products were to be put.

* * * * *

While [the booklets] purport to be scientific publications of general interest apart from the articles produced and marketed by appellant, written by an expert in the field, in fact, all are replete with references to the Kordel products and their uses to prevent, ameliorate or cure a vast and diverse variety of ailments, and each conveniently closes with a price list of the various Kordel products recommended for use therein. All are concerned primarily with promoting the sale of the various products by explaining the need for each, along with extravagant claims as to the usefulness of each.

The court below held that the booklets constituted "labeling" within the meaning of the Act. We respectfully submit that there is no error in that holding.

## II

### THE MISDEMEANORS CHARGED, NOT BEING INFAMOUS CRIMES, WERE PROPERLY PROSECUTED UPON CRIMINAL INFORMATIONS

The petitioner contends that he was improperly prosecuted upon criminal informations because the misdemeanors charged were infamous crimes.

He argues that Section 303 (b) of the Act, which fixes the penalty for violating any of the provisions of Section 301 "with intent to defraud or mislead" at imprisonment for not more than three years, classes the misdemeanors as infamous. Section 303 (a), however, establishes the penalty for a violation of Section 301 as imprisonment for not more than one year, or a fine of not more than $1,000 or both such imprisonment and fine.

The crimes charged against the petitioner were violations of Section 301 (a). No allegation was made that the acts committed were done "with intent to defraud or mislead". The maximum penalty that could have been inflicted under the charge made was imprisonment for not more than one year, or a fine of not more than $1,000, or both. Prosecution by criminal information, therefore, was proper. *Hunter* v. *United States*, 272 Fed. 235 (C. C. A. 4), certiorari denied, 257 U. S. 633; *Falconi* v. *United States*, 280 Fed. 766 (C. C. A. 6); *Sturcz* v. *United States*, 57 F. (2d) 90 (C. C. A. 3); *Taylor* v. *United States*, 142 F. (2d) 808, 816 (C. C. A. 9); and *Brede* v. *Powers*, 263 U. S. 4.

In *Hunter* v. *United States*, the court said (pp. 238–239):

> * * * all misdemeanors under the federal law may be tried upon information, unless there should be coupled with the punishment of imprisonment some specific

provision making the particular misdemeanor infamous. There is no such provision in the statute under consideration. The limit of punishment for the crime with which the defendant here is charged is imprisonment for not more than one year, or a fine of not more than $1,000, or both. Indictment by a grand jury, therefore, was unnecessary.

Under the National Prohibition Act, 41 Stat. 305, 316, the penalty for a first offense for selling liquor was fixed at imprisonment for a period not exceeding 6 months, or a fine of not more than $1,000. The same section established a higher penalty for second offense violations which included a possible term of imprisonment of 5 years. Nevertheless, the courts generally held that a first offense charge did not charge an infamous crime. *De Jianne* v. *United States,* 282 Fed. 737 (C. C. A. 3).

The provisions of Section 303 (b) establishes a different grade of crime, and that particular crime, when charged, must be by indictment of a grand jury. The penalty that might be inflicted upon a charged violation of Section 301 (a) with intent to defraud or mislead includes imprisonment for more than one year, and, therefore, the crime is an infamous one. That, however, does not make the lesser grade of the offense an infamous crime.

## CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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OCTOBER 1948.

# APPENDIX

## STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 (21 U. S. C. 301, et seq.), and regulations issued thereunder follow:

SEC. 201. For the purposes of this Act—

* * * * *

(g) The term "drug" means * * * (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure of any function of the body of man or other animals; * * *.

* * * * *

(k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; * * *

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

SEC. 301. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

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SEC. 303. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on

conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 301, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

SEC. 502. A drug or device shall be deemed to be misbranded—(a) If its labeling is false or misleading in any particular.

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(f) Unless its labeling bears (1) adequate directions for use; * * *

REGULATION

21 C. F. R. Cum. Supp. § 2.2 Labeling includes all written, printed, or, graphic matter accompanying an article at any time while such article is in interstate commerce or held for sale after shipment or delivery in interstate commerce.

U. S. GOVERNMENT PRINTING OFFICE: 1948